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OCTOBER TERM, 1897.

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RICHARD S. WILLIAMS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

SYNOPSIS OF ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

GEORGE D. COLLINS,
Counsel for Plaintiff in Error.

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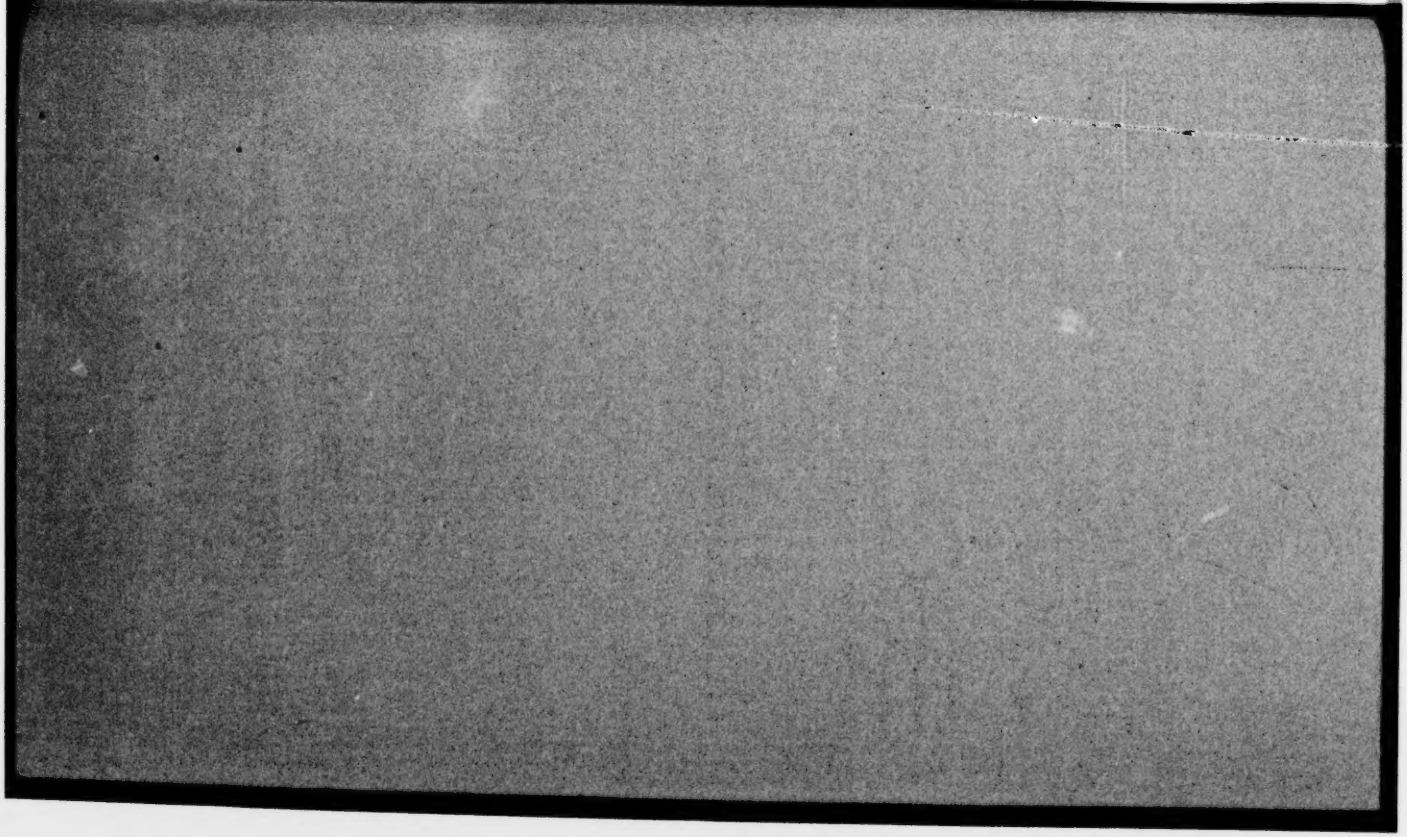

IN THE

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These cases are before this Court on writs of error directed to the district court for the northern district of California. There are two judgments to be reviewed. The cases were tried together in the district court, that court having made an order consolidating the indictments.

Each indictment contains two counts. The objection was raised by demurrers that the indictments do not charge a criminal offense. The demurrers were overruled.

The cases were tried and the defendant convicted. He then secured the services of other counsel, who made a motion in arrest of judgment.

The motion was sustained in respect to the second count in each indictment. The defendant was then sentenced in each case to imprisonment in the penitentiary for the term of three years and fined five thousand dollars, with further imprisonment until the fine be paid. The sentences are to run consecutively and not concurrently.

The points relied upon in support of the prayer for reversal are the same in each case, with one exception, to wit, in the case where it is charged that the money was extorted from Wong Sam. We there make the additional point that the evidence is insufficient.

I.

The first objection we make to the judgments is that the indictments do not charge a criminal offense. They attempt to charge malfeasance in office. On the margin of each indictment is a reference to the statutes upon which it was drawn.

That reference was put there by the pleader, the person who framed the indictment. The district court held that the indictments were rightly drawn under the statutes referred to, and it is now contended by the Government that those statutes are applicable to these cases on the theory that defendant was a customs inspector. The indictments were certainly drawn under the statutes referred to. The language used in the indictment is sufficiently descriptive of the statutes to demonstrate that they alone are the basis of the pleading.

We maintain, first, that the statutes mentioned, to wit, section 23 of the act of February 8, 1875, and sub-

division one of section 3169 of the Revised Statutes, have no application to the facts set forth in the indictments; that therefore no crime is charged. We say in that respect the statutes only apply to persons appointed or acting under authority of an internal or customs *revenue* law or "any revenue provision of any law of the United States," and that the defendant was not so appointed or acting; that he was not a customs inspector; but, on the contrary, that he was appointed under a non-revenue law, to wit, that portion of the appropriation acts relative to the enforcement of the Chinese exclusion law, where it is provided, *inter alia*, that suitable officers are to be appointed to enforce the laws in relation to the exclusion of Chinese. We also say that even if the position of the Government is correct, to wit, that defendant was a customs inspector and therefore a *revenue* officer, that the indictments do not allege extortion under color of *that* office, but, on the contrary, allege extortion under color of the office of Chinese inspector—the office conferred on defendant for the purpose of enforcing a non-revenue law—the Chinese exclusion act; and we further say that even if the fact were otherwise, and even if we assume that the extortion was had under *color of the office of customs inspector*, that still the indictments are insufficient, because the extortion prohibited by section 3169 of the Revised Statutes is extortion under color of *law*, whereas these indictments charge extortion under color of *office*.

Reverting to the position taken by the Government—that defendant was appointed a customs inspector pursuant to the provisions of section 2606 of the Revised Statutes, and that therefore he is amenable to the provisions of section 3169 of

the Revised Statutes—we ask, Is there anything independent of the *ipse dixit* itself which tends to show that defendant was appointed a customs inspector? The court takes *judicial notice* of the action of the Treasury Department appointing defendant Chinese inspector to enforce the provisions of the exclusion law.

The court has *judicial knowledge* of the character of the appointment. (1 Greenleaf on Evidence, sec. 6; N. Y. & Md. R. R. Co. *vs.* Winans, 17 How., 31, 41; Brown *vs.* Piper, 91 U. S., 42; Campbell *vs.* Wood, 116 Mo., 202; People *vs.* Johr, 22 Mich., 261.)

True, the facts composing that knowledge are not set forth in the record as *evidence* in the case; it would be very absurd if they were, just as absurd as though the law governing the case was set forth as matter of evidence. The judicial knowledge of the court dispenses with evidence of facts within the scope of that knowledge. This Court, then, taking judicial notice of defendant's appointment, knows that it is as follows, viz:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *November* 10, 1893.

"Division of appointments, H. K.

"Mr. R. S. WILLIAMS, *San Francisco, Cal.*

"SIR: You are hereby appointed an inspector to enforce the provisions of the Chinese exclusion acts, at a compensation of four dollars ($4.00) *per diem*, with actual and necessary expenses while traveling on official business, payable from the appropriation to defray the expenses incurred under said acts, the appointment to take effect from date of oath.

"You will report in writing to the supervising agent of this Department for instructions and assignment to duty.

"Respectfully yours,

"(Signed) W. E. CURTIS,
"*Acting Secretary.*

"R. H.

"H.
"J."

This Court knows, therefore, that defendant was not appointed customs inspector pursuant to section 2606 of the Revised Statutes, but was appointed Chinese inspector pursuant to the provision contained in the appropriation acts relative to the enforcement of the Chinese exclusion law by the *appointment* of suitable officers for the purpose, not, as contended by the Government, by the assignment of revenue officers to the duty, but by *appointment* of officers for the specific purpose of enforcing that law. Then, again, if the defendant was a customs inspector, he was a revenue officer, and he would therefore be subject to the provisions of section 3169 without reference to section 23 of the act of February 8, 1875, and in that event the latter act must be considered irrelevant; if irrelevant, then as the indictments were *ex vi termini* drawn under that act, the descriptive averments being designed to bring the cases within that act, the indictments must fail (Bishop's Statutory Crimes, 1st ed., sec. 380; 1 Bishop's New Crim. Proc., sec. 612). The Assistant Attorney General is mistaken in assuming that section 23 of the act just mentioned applies the penalties prescribed in pre-existing revenue laws to officers of the Department of Treasury. It is only to such officers of the Treasury Department as are appointed or acting under a

revenue law, *and* who are not within the provisions of pre-existing laws, that section 23 applies.

II.

The error of the district court in consolidating the indictments lies in the fact that the same evidence is not applicable to the proof of the allegations of both indictments. The effect of combining the indictments and having but one trial was to infringe upon the elementary rule that evidence of one crime is no evidence of another; while there are exceptions to the rule—exceptions relative to proof of *scienter*—those exceptions have no application here. The jury cannot be expected to base the verdict upon the evidence appropriate to each case, when the cases are tried as one and the testimony introduced and admitted as though there was but one case on trial.

III.

If the defendant's affidavit made by him in his divorce suit was relevant on the trial had on these indictments, then undoubtedly its admission in evidence, against defendant's objection and exception, was clearly in violation of section 860 of the Revised Statutes. That law applies to all evidence obtained from defendant "by means of a judicial proceeding." The defendant's affidavit was evidence. Section 2002 of the Code of Civil Procedure of the State of California provides: "The testimony of witnesses is taken in three modes: 1, by affidavit; 2, by deposition; 3, by oral examination."

It is immaterial whether the evidence was obtained through voluntary or involuntary disclosure, if it would not have been obtained, were it not for the pendency of the "judicial proceeding."

Section 860 of the Revised Statutes was intended to cover cases not within the fifth amendment, and it must be liberally construed; in a broad sense, every disclosure made by a person under oath and as a witness in court in a judicial proceeding is produced by means of the proceeding, and therefore, strictly speaking, is not voluntary. The process of law is coercive.

IV.

The instruction to the effect that the jury could infer from the failure of defendant to explain from what source and how he obtained *prior* to the alleged commission of the extortion referred to in the indictments certain sums of money, is not sustained by the authorities cited in the Assistant Attorney General's brief; those authorities confine the rule they announce to money acquired or in the possession of a defendant *subsequently* to the commission of the offense; and in reason that must be so. The possession of money *before* the offense was committed could not show in the least degree that it was the product of the crime. Then as to that portion of the instruction relative to money *deposited* in bank *after* the alleged commission of the extortion referred to in the indictments, in the first place, the fact of then depositing the money in bank would furnish no evidence that the money was acquired *subsequent* to the offense. In the next place, there being no evi-

dence showing or tending to show that when defendant acquired the money he was impecunious or insolvent and the record affirmatively stating (p. 43) that there is nothing indicating that the money is the "fruit of crime," no explanation on his part was necessary. In *Com. vs. Churchill*, 11 Met., 534, the rule relied upon by the Assistant Attorney General is correctly stated, together with its limitations, and as there construed does not sustain his position in these cases. In his brief the Assistant Attorney General, in discussing the admission of the evidence upon which the instruction is based, says:

"This testimony was all admissible for the reasons before stated, viz., to show in the hands of the defendant at or about the time of the alleged offense an unusual and unreasonable amount of money. It was to show a sudden and material change in the financial circumstances of the defendant indicating a recent receipt of money about the time of the commission of the offense in some other way than the course of his business."

Now, the conclusive answer to all that is, the evidence has no such tendency. On the contrary, the affidavit explicitly states that defendant had possession of all the money and more *prior* to his employment by the Government. True, the lower court told the jury that they were at liberty to accept as true such part of the affidavit as they saw fit and to reject the rest; but that instruction is radically wrong, for there was no evidence tending to impeach the statements in the affidavit. The record affirmatively shows such to be the fact (Trans., 34, 43, 45). Surely the jury could not arbitrarily accept a portion of the affidavit and reject the rest. How it is possible to reconcile the instructions of the lower court with the doctrine of

Chaffee vs. United States, 18 Wall., 545; *Doty vs. State*, 7 Blackf., 427, is certainly a question that the Government makes no attempt to answer.

Finally, the instructions virtually permit the jury to find the defendant guilty merely upon his failure to explain his acquisition of the money deposited in the Hibernia bank and in the bank of the San Francisco Savings and Loan Society. Such an instruction, even in a larceny or embezzlement case, would be clearly erroneous (*People vs. Ah Ki*, 20 Cal., 179; *People vs. Beaver*, 49 Cal., 57). It must be borne in mind that even where evidence of the possession of property is admissible in a criminal case, that it is addressed exclusively to the identity of the criminal and not to the crime. It is never considered evidence of the *corpus delicti*. Hence the necessity of a *prima facie* showing that the possession is a guilty one. Until that showing is made it is not incumbent on the defendant to explain his possession. Tested by that rule, the instructions in question are manifestly erroneous.

V.

The errors relative to the admission of evidence other than the affidavit are sufficiently discussed in our brief. In respect to the error relative to the misconduct of the special attorney for the Government, we will simply add that it was not merely colloquy between counsel nor a side remark, but was a very prominent feature of the trial and within the cognizance of the jury. The ruling of the lower court made the misconduct a part of the prosecution's case.

VI.

The point as to the insufficiency of the evidence in the case where it is charged the money was extorted from Wong Sam is likewise adequately presented in our brief. The Government, in its brief makes no attempt to reply to the point.

Respectfully submitted.

GEORGE D. COLLINS,
Counsel for Plaintiff in Error.